

1-1972

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Recommended Citation

James T. Fousekis, *Prisoner Mutual Legal Assistance and Access to the Courts: Recent Developments and Emerging Problems*, 23 HASTINGS L.J. 1089 (1972).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol23/iss4/3

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Prisoner Mutual Legal Assistance and Access to the Courts: Recent Developments and Emerging Problems

By JAMES T. FOUSEKIS*

DESPITE the substantial development of legal assistance programs for the poor during the last few years, indigent prisoners' demands for legal assistance still frequently go unheard.¹ Indeed, it is only within the last two or three years that significant attention has been paid to the problem of providing adequate representation for indigent inmates. This attention has largely been a result of judicial decisions dealing with the activities of "jailhouse lawyers,"²—those members of the prison population who profess familiarity with the law and with the drafting of legal documents.

The call for comprehensive prison reform continues to echo from the highest places,³ yet the day-by-day, case-by-case struggle to protect inmates' rights and to change the inequities of their confinement remains relatively unnoticed. This struggle has been and will continue to be fought mainly in the courts. For this reason, adequate legal representation for indigent prisoners is essential.

The purpose of this article is to explain the current system of mu-

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1. It is, of course, recognized that counsel on direct appeal is constitutionally required. *Douglas v. California*, 372 U.S. 353 (1963). But there has arisen an almost equally pressing need for attorneys (1) to assist on collateral attack of allegedly improper judgments against prisoners and (2) to challenge conditions of confinement. See, e.g., Krause, *A Lawyer Looks at Writ-Writing*, 56 CALIF. L. REV. 371, 373 (1968); Larsen, *A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343, 345 (1968). And, as Justice Douglas has recently commented, "[w]hile demand for legal counsel in prison is heavy, the supply is light." *Johnson v. Avery*, 393 U.S. 483, 493 (1969) (concurring opinion).

2. E.g., *Johnson v. Avery*, 393 U.S. 483 (1969); *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub. nom.* *Younger v. Gilmore*, 404 U.S. 15 (1971); *In re Harrell*, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970).

3. E.g., Burger, *No Man Is an Island*, 56 A.B.A.J. 325 (1970).

tual legal assistance and discuss the emerging case law related thereto, to indicate the special problems of providing adequate counsel for the indigent prisoner, and to suggest possible programs that would guarantee concrete and permanent assistance from the bar. Hopefully, this article will do more than illuminate the past failures of the legal profession (including bar associations and law schools) in the area of prisoner legal representation and prison reform. Perhaps it will further awaken the profession to the sensitive problems and continued legal needs of prison inmates.⁴

Changing Judicial Attitudes on Prison Affairs

Historically, both state and federal judicial systems have been reluctant to interfere in matters characterized as "prison management." In the 1950's and early 1960's, opinions of federal courts denying inmates' attempts to vindicate their rights were replete with cliches justifying the courts' reluctance to interfere in prison management.⁵ Characteristic was the remark in one appellate decision:

We think it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.⁶

Too often in the past such a cliché represented both the beginning and end of judicial inquiry into prisoners' complaints. For example, in 1952 the Fifth Circuit denied relief to an inmate whose mail had been allegedly censored by institutional authorities, the abstention

4. Bar Associations and other legal groups have recently begun to focus their energies on prison reform. In *Smith v. Carberry*, No. C-70-1244 RHS (N.D. Cal. 1971), attorneys from some of the largest San Francisco law firms have challenged, on behalf of prisoner clients, the conditions at the San Francisco County Jail at San Bruno.

One fourth of the state bar associations now have special committees on correctional reform, each pursuing a variety of projects to improve local and statewide facilities. *San Francisco Recorder*, Feb. 16, 1972, at 1, col. 3.

5. For instance, one appellate judge remarked: "Federal courts will rarely intervene to interfere with the conduct of State officials carrying out their duties under State laws." *Morris v. Radio Station WENR*, 209 F.2d 105, 107 (7th Cir. 1953). Another judge stated the following to justify abstention by the federal judiciary: "It is a rule grounded in necessity and common sense, as well as authority, that the maintenance of discipline in a prison is an executive function with which the judicial branch ordinarily will not interfere." *Sewell v. Pegelow*, 291 F.2d 196, 197 (4th Cir. 1961). The state courts have echoed until recent years the sentiment expressed in the federal sphere: "The courts are and should be reluctant to interfere with or to hamper the discipline and control that must exist in a prison." *In re Riddle*, 57 Cal. 2d 848, 852, 372 P.2d 304, 306, 22 Cal. Rptr. 472, 474 (1962).

6. *Stroud v. Swope*, 187 F.2d 850, 851-52 (9th Cir. 1951).

resting on the ground that such official action fell within the category of "treatment and discipline."⁷ However, decisions in recent years have begun to confront directly the problems of prisoners' rights, suggesting some erosion of the prior "hands off" attitude of the judiciary. In one 1968 case,⁸ the same Fifth Circuit reversed a lower court ruling and granted relief to a black inmate because state prison regulations narrowly restricting reading materials had deprived him of equal protection of the law.

Some deprivations are a necessary and expected result of being an inmate of a penal institution, which institution must provide for the custody, maintenance, discipline and optimistically, rehabilitation of those who have violated the laws of the sovereign.

However, we have come a long way from some earlier attitudes toward the rights of prisoners There has been the growing recognition that "[a] prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law."

[I]t is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clause of the Fourteenth Amendment *follow them into prison and protect them there from unconstitutional action* on the part of prison authorities carried out under the color of state law.⁹

Within the last few years, the judiciary has been besieged with inmate complaints and has sensed the urgent need to correct many improper prison practices. For instance, courts have recently condemned as unconstitutional any overt racial discrimination against inmates,¹⁰ struck down numerous prison disciplinary measures as "cruel and unusual,"¹¹ heard convict allegations of inadequate or incompetent medical care,¹² ordered prison officials to supply inmates with reasonable medical attention,¹³ and prevented the continued use of solitary confinement in "strip cells"¹⁴ unless officials provided "a degree of cleanliness compatible with elemental decency in accord with the standards of a civilized community."¹⁵ This trend, this renewed judicial inquiry

7. *Adams v. Ellis*, 197 F.2d 483, 485 (5th Cir. 1952).

8. *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968).

9. *Id.* at 532 (emphasis added).

10. *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1967), *aff'd per curiam*, 390 U.S. 333 (1968).

11. *E.g.*, *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966); *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965).

12. *Hirons v. Director, Patuxent Institution*, 351 F.2d 613 (4th Cir. 1965).

13. *Talley v. Stephens*, 247 F. Supp. 683 (E.D. Ark. 1965).

14. A strip cell is a small prison cubicle with minimal furnishings to which an inmate is sent only for disciplinary purposes. *Jordan v. Fitzharris*, 257 F. Supp. 674, 676 (N.D. Cal. 1966).

15. *Id.* at 683. Chief Judge Harris of the United States District Court for the

into prison conditions and procedures, is increasing.¹⁶

It is within the context of this growing awareness—on the part of the judiciary, the legal community and society at large—that consideration must be given to the availability of the courts to prisoners' complaints. It is with this perspective that one must measure the likelihood of inmates (particularly those of little financial means) obtaining redress from possible unlawful confinement or from intolerable conditions within prison walls. It is under these circumstances that one may question whether the present system of mutual legal assistance and prisoner self-representation is sufficient and effective.

How Indigent Prisoners Are Represented or Represent Themselves

The Jailhouse Lawyer

When a habeas corpus petition raises a substantial issue concerning the confinement of an indigent prisoner or the conditions of his confinement, the court normally appoints counsel to represent him in the ensuing proceedings.¹⁷ The appearance of counsel at these hearings, though necessary, still does not by itself afford sufficient legal assistance. Indeed, since the heart of a habeas corpus petition is its persuasive presentation of appropriate facts (in order to convince the court that the matter is worth further judicial inquiry), the fact that most indigents have no counsel at the *initial stage*, the time a petition is filed, presents a significant disability.¹⁸ It has been primarily to fill this gap that prisoners have turned to members of their own ranks for assistance, and the "jailhouse lawyer" has emerged.¹⁹

Northern District of California noted in *Jordan* that "the administrative responsibility of correctional institutions usually rests peculiarly within the province of the officials themselves, without attempted intrusion or intervention on the part of the courts." *Id.* at 680. He then went on to hold that since the prison officials in question had "abandoned elemental concepts of decency" by permitting "shocking and debased" conditions to exist, the injunctive relief prayed for would be granted. *Id.*

16. Several potential landmark cases attacking prison conditions and procedures have recently been filed and/or decided in the Northern District of California. *E.g.*, *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub. nom. Younger v. Gilmore*, 404 U.S. 15 (1971); *Clutchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Smith v. Carberry*, No. C-70-1244 RHS (N.D. Cal. 1971). These decisions may extend even further the judicial awareness of this sensitive area.

17. "In most federal courts, it is the practice to appoint counsel in post-conviction proceedings only after a petition for post-conviction relief passes initial judicial evaluation. . . ." *Johnson v. Avery*, 393 U.S. 483, 487 (1969).

18. *See Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970) *aff'd per curiam sub. nom. Younger v. Gilmore*, 404 U.S. 15 (1971). *See also* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 237 (1970).

19. There is presently authority for the proposition that the courts, state and

Prison officials originally tended to view the jailhouse lawyer as a disrupter of prison discipline and an intruder in the orderly operation of their institutions.²⁰ They stressed the potential abuses of privilege by jailhouse lawyers, especially the use of favoritism and petty bribery.²¹ Many restrictive regulations were formulated in order to tie the hands of in-prison "counsel."²² A body of recent case law in the area, however, has curtailed restrictions on the activities of inmate advisors and evidences the gradual recognition of the jailhouse lawyer's role in prison life.²³

Ex Parte Hull and Its Progeny

In *Ex Parte Hull*,²⁴ perhaps the most significant early decision in the area of prisoner legal assistance, the United States Supreme Court struck down state prison regulations that required an inmate's legal documents to be approved before they might be forwarded to the

federal, may refuse counsel for prisoners who merely indicate a desire to attain post conviction judicial relief. Some reasonable sort of claim must be presented. *See, e.g., Barker v. Ohio*, 330 F.2d 594 (6th Cir. 1964). "Accordingly, the initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself with such help as he can obtain within the prison walls. . . . In the case of all except those who are able to help themselves—usually a few old hands or exceptionally gifted prisoners—the prisoner is, in effect, denied access to the courts unless such help is available." *Johnson v. Avery*, 393 U.S. 483, 488 (1969).

20. *See, e.g., Spector, A Prison Librarian Looks at Writ-Writing*, 56 CALIF. L. REV. 365, 366 (1968).

21. A former prison librarian at San Quentin has written as follows: "[W]e attribute much of the friction between inmates to the inability of one man to pay another his 'fee,' earned for the performance of legal services. . . ." *Id.* *See Johnson v. Avery*, 393 U.S. 483, 488 (1969); *In re Harrell*, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970).

22. *Johnson v. Avery*, 393 U.S. 483 (1969); *In re Harrell*, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970).

23. *See Johnson v. Avery*, 393 U.S. 483 (1969); *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub. nom. Younger v. Gilmore*, 404 U.S. 15 (1971); *In re Harrell*, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970). The Supreme Court's per curiam affirmance of *Gilmore* is a tacit recognition of the expanded role of jailhouse lawyers. The issue in the case, whether the prison must supply legal books and treatises, is only significant if such books can be utilized—either directly by the inmates themselves or indirectly by their "jailhouse lawyers."

24. 312 U.S. 546 (1941). Note, however, the unique status of the "jailhouse lawyer." Ordinarily, there is no constitutional guarantee that non-attorneys may represent others in litigation; indeed, it is generally prohibited because non-attorneys lack the expertise and are not subject to the same code of responsibility as are lawyers. *See R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 25 (1953). The exception in the case of the jailhouse lawyer stems from two main factors: "(1) special concern for the right to seek the writ of habeas corpus, one aspect of the general rule that individuals deprived of liberty by the state have greater rights to state-supplied attorneys and other necessary aids than parties in private civil litigation; (2) the fact

courts. Such regulations were held to impair the prisoner's right to apply to a federal court for a writ of habeas corpus.²⁵ Other decisions, as much as a decade ago, suggested more broadly that such right of access to the courts was of constitutional stature, that such right was guaranteed against undue state interference by virtue of the due process clause of the Fourteenth Amendment.²⁶ And lately some courts have bluntly asserted that prisoners must be "accorded unfettered access to the courts to seek vindication of their rights."²⁷

Johnson v. Avery

In the 1969 case of *Johnson v. Avery*²⁸ the Supreme Court dealt directly with regulations attempting to restrict the activities of jailhouse lawyers. Relying in part on the rationale of *Ex Parte Hull*,²⁹ the Court held that a Tennessee prison regulation preventing one inmate from assisting another in preparing writs of habeas corpus unlawfully impeded access to the courts. Although the court recognized that "writ writers" sometimes posed a potential danger to prison discipline³⁰ and were often unskilled,³¹ the Court nevertheless barred enforcement of the regulation in question:

The considerations that prompted [the regulation's] formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus.³²

While it relied on the rationale of *Hull* in reaching its decision in *Johnson v. Avery*, the Supreme Court seemed to herald a much wider scope of prisoners' rights in the future. On the basis of previous Supreme Court decisions which held that the right to a writ of habeas corpus must not be conditioned upon ability to pay,³³ the Court in *John-*

that prisoners are closed off from the rest of society and thus unable to seek out what legal help does exist." *Guajardo v. Luna*, 432 F.2d 1324, 1325 (5th Cir. 1970).

25. 312 U.S. at 549.

26. *E.g.*, *Hatfield v. Bailleaux*, 290 F.2d 632, 635-36 (9th Cir. 1961), *cert. denied*, 368 U.S. 862 (1961).

27. *Landman v. Peyton*, 370 F.2d 135, 137 n.1 (4th Cir. 1966), *cert. denied*, 388 U.S. 920 (1967); *Brown v. South Carolina*, 286 F. Supp. 998, 1001 (D.S.C. 1968). Quite recently the Supreme Court has stated that "[t]he right of access to the courts is . . . but one aspect of the right to petition." *California Motor Transport Co. v. Trucking Unlimited*, 92 S. Ct. 609, 612 (1972).

28. 393 U.S. 483 (1969).

29. 312 U.S. at 549.

30. 393 U.S. at 488.

31. *Id.*

32. *Id.* at 488, *quoting Ex Parte Hull*, 312 U.S. 546, 549 (1941).

33. 393 U.S. at 486; *see Long v. District Court*, 385 U.S. 192 (a state is obli-

son concluded as follows: "[I]t is *fundamental* that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."³⁴

In the absence of some provision by the state of Tennessee for a "reasonable alternative" to assist illiterate or poorly educated inmates in preparing petitions for postconviction relief, the regulation barring jailhouse lawyers was impermissible.³⁵ Although Justice White pointed out in his dissent that the use of a "jailhouse lawyer" was certainly no guarantee that a habeas corpus petition would be properly prepared,³⁶ the Court clearly held that "post-conviction proceedings must be more than a formality."³⁷

Post-Johnson Cases: In re Harrell

The broad language contained in *Johnson* will likely serve as the source for new efforts to extend prisoner access and legal assistance.

gated to furnish indigent prisoners with a transcript of equivalent record of prior habeas corpus hearings for use in further proceedings); *Smith v. Bennett*, 365 U.S. 708 (a state may not make writ available only to prisoners who could afford a filing fee).

34. 393 U.S. at 485 (emphasis added). See *United States v. Simpson*, 436 F.2d 162, 166 (D.C. Cir. 1970), where the court elaborated on this concept in dictum: "where the government does not provide legal assistance for inmates it cannot deny the poorly educated inmate the opportunity to consult other prisoners for assistance in seeking habeas corpus, coram nobis, or other collateral relief."

35. 393 U.S. at 490. In *Johnson* the Supreme Court noted various alternatives that a state might utilize if it sought to prohibit "jailhouse lawyering." Among the alternatives enumerated, about which the Court expressed no judgment, were the following: (1) a public defender arrangement whereby attorneys would be available to consult with prisoners, (2) a system whereby senior law students would be permitted to interview and advise inmates, and (3) a plan whereby members of the local bar could periodically consult with prisoners concerning various problems. *Id.* at 489-90. One three-judge district court later commented, "[t]he alternatives open to the State are legion." *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd per curiam sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971). The Supreme Court, in its affirmance of *Gilmore*, did not elaborate on these alternatives. *Cf. McGautha v. California*, 402 U.S. 183, 255 (1971) (dissenting opinion), where Justice Brennan remarked: "While we have, on rare occasions, held that due process requires specific procedural devices not explicitly commanded by the Bill of Rights, we have generally either indicated one acceptable procedure and left the States free to devise others, or else [as in *Johnson*] merely ruled upon the validity or invalidity of a particular procedure without attempting to limit or even guide state choice of procedural mechanisms beyond stating the obvious proposition that inadequate mechanisms may not be employed."

36. *Id.* at 499-500 (dissenting opinion). *Cf. Sostre v. McGinnis*, 442 F.2d 178, 201 n.45, 202 n.47 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3431 (U.S. Mar. 6, 1972); *Hatfield v. Bailleaux*, 290 F.2d 632, 639 (9th Cir. 1961), *cert. denied*, 368 U.S. 862 (1961).

37. 393 U.S. at 486.

Moreover, the ensuing cases will undoubtedly concentrate on and attempt to delineate further the vague guidelines suggested in *Johnson*. One decision which pursued that course was rendered by the California Supreme Court in *In re Harrell*.³⁸ In that recent case the court struck down a state prison regulation proscribing one prisoner from possessing another's legal papers, on the ground that such a regulation improperly restricted the right of mutual prisoner assistance.

The court relied heavily on the reasoning of *Johnson*.³⁹ The regulation in question provided that "[a]ll briefs, petitions and other legal papers must be and remain in the possession of the inmate to whom they pertain."⁴⁰ The court recognized that the rule was designed to prevent possible abuses by jailhouse lawyers, but it reasoned that such abuses could be dealt with in other ways:

Our conclusion that the rule in question impedes or discourages mutual prisoner assistance to a significant degree does not . . . require that the rule be invalidated. It does, however, place the burden of justification upon the Director. We have reviewed above the abuses which the rule was designed to avoid, that is, the withholding of legal papers to enforce remuneration or achieve other illicit objectives, and the avoidance of situations conducive to violence. Clearly these are substantial concerns and custodial officials must not be prevented from taking effective action against such conduct. It does not appear, however, that the only means of attaining this objective must entail the severe restriction upon mutual prisoner assistance which the questioned rule involves. *Johnson* itself contemplates that punishment may be imposed [directly upon an inmate] for the giving or taking of remuneration in connection with writ-writing activities⁴¹

Post-Johnson Cases: *Gilmore v. Lynch*

Another noteworthy post-*Johnson* decision arose in California within the last two years. *Gilmore v. Lynch*,⁴² recently affirmed per curiam by the United States Supreme Court, arose initially before a three-judge federal district court. *Gilmore* dealt specifically with the question of the adequacy of prison libraries in California. Under

38. 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970).

39. *Id.* at 686, 470 P.2d at 646, 87 Cal. Rptr. at 510.

40. CALIFORNIA DEP'T OF CORRECTIONS, DIRECTOR'S RULES, Rule D2602 (1970).

41. 2 Cal. 3d at 687, 470 P.2d at 647, 87 Cal. Rptr. at 511; *cf.* *Wimberley v. Campoy*, 446 F.2d 895 (9th Cir. 1971), where a civil rights suit against a correction officer for seizure of papers from a "jailhouse lawyer" was decided against the inmate. Here the seizure had occurred prior to the decision in *Harrell* and in good faith, so the officer was not liable. And a similar result was reached in *McKinney v. DeBord*, 324 F. Supp. 928 (E.D. Cal. 1970).

42. 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub. nom.* *Younger v. Gilmore*, 404 U.S. 15 (1971).

attack was a prison regulation limiting legal treatises and books in the state's prison libraries to eleven standard codes and references.⁴³

The plaintiffs in *Gilmore*, prisoners at various institutions administered by the California Department of Corrections, challenged the regulation on the ground that it denied indigent prisoners equal protection of the law and access to the courts. The three-judge panel agreed with the plaintiffs regarding the need for prisoner legal assistance.⁴⁴ Compelled by the strong language in *Johnson v. Avery*, the court summarily rejected the attorney general's argument that legal authorities were unnecessary for prisoners to draft an adequate habeas corpus petition:

[T]his Court takes notice that more than simple "facts" are needed in order to file an adequate petition for relief by the way of habeas corpus. A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent. He should know *which* facts are legally significant, and merit presentation to the Court, and which are irrelevant or confusing. When the Return is filed, it is never without abundant citations to legal authority, and a proper traverse must take cognizance of these points. *No attorney filing a habeas petition omits a statement of points and authorities, and neither does the State's attorney in responding to one.*⁴⁵

The court, in granting relief, suggested that the California Department of Corrections "expand the present list of basic codes and references in the manner suggested by this opinion, or . . . adopt some new method of satisfying the legal needs of its charges."⁴⁶

Other Post-Johnson Cases: The Appellate Level

A number of other decisions in the last several years have also

43. The basic codes and references set forth in the regulations were the California Penal Code, California Welfare & Institutions Code, California Health & Safety Code, California Vehicle Code, United States and California constitutions, a recognized law dictionary, Witkin's *California Criminal Procedure*, subscriptions to *California Weekly Digest*, California Rules of Court, Rules of United States Court of Appeals for the Ninth Circuit, and Rules of the United States Supreme Court. *Id.* at 107 n.2.

44. *Id.* at 110 (N.D. Cal. 1970) "Johnson v. Avery . . . has explicitly recognized the relevance of legal expertise to the filing of petitions in habeas corpus. For all practical purposes, if [illiterate and poorly educated] prisoners cannot have the assistance of a 'jail-house lawyer,' their possibly valid constitutional claims will never be heard in any court. . . ." The initial burden of persuading a judge that an evidentiary hearing is necessary lies with the prisoner; given the hundreds of petitions with which the courts are flooded, this burden is a heavy one which only 'a few old hands or exceptionally gifted prisoners' can carry." *Id.*

45. *Id.* (emphasis added).

46. *Id.* at 112.

sought to interpret the broad language of *Johnson*.⁴⁷ In *Beard v. Alabama Board of Corrections*,⁴⁸ decided shortly after *Johnson*, the Fifth Circuit rendered a brief (two-page) opinion striking down an Alabama prison "no assistance" directive.⁴⁹ The court found little distinction between the Alabama directive and the regulation found "constitutionally defective" in the *Johnson* case.⁵⁰

In terms of providing insight into the scope of *Johnson*, the court's dictum may be far more enlightening than its holding. The court suggested that rules limiting the nature and degree of inmate legal assistance were by no means automatically invalid. Indeed, a regulation banning mutual legal assistance altogether could be sustained *provided that* the state or local government made available "a sufficient number of qualified attorneys or other persons capable and willing to render voluntary assistance in the preparation of petitions for *habeas corpus* relief."⁵¹

In another 1969 decision, *Wainwright v. Coonts*,⁵² the Fifth Circuit declared invalid a slightly different Florida prison regulation. In *Coonts*, a habeas corpus action brought by a prisoner punished for violating the Florida directive, the state questioned whether the scope of *Johnson* had been overestimated. The Florida attorney general claimed that the invalidity of the Tennessee regulation in *Johnson* was

47. *E.g.*, *Williams v. United States Dep't of Justice*, 433 F.2d 958, 959-60 (5th Cir. 1970); *Gittlemacker v. Prasse*, 428 F.2d 1, 7 (3d Cir. 1970); *Sigafus v. Brown*, 416 F.2d 105, 107 (7th Cir. 1969); *Cruz v. Beto*, 415 F.2d 325 (5th Cir. 1969); *Wainwright v. Coonts*, 409 F.2d 1337, 1337-38 (5th Cir. 1969); *Honore v. Washington State Bd. of Prison Terms & Paroles*, 77 Wash. 2d 660, 666-67, 466 P.2d 485, 489 (1970).

48. 413 F.2d 455 (5th Cir. 1969).

49. The Alabama rule in question provided as follows: "No inmate will advise, assist, or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters." *Id.* at 456 n.1.

50. The two regulations were, in the words of the Fifth Circuit, "substantially identical." *Id.* at 456.

51. *Id.* at 457 (dictum). In this respect, it is important to note that several courts have expressly declared that a petitioner on habeas corpus does not possess an *absolute* right to appointed counsel. *E.g.*, *Plaskett v. Page*, 439 F.2d 770 (10th Cir. 1971); *Aubut v. Maine*, 431 F.2d 688 (1st Cir. 1970); *Ratley v. Crouse*, 365 F.2d 320 (10th Cir. 1966). However, a system may be worked out to take advantage of the resources of the law schools and student counseling programs. *United States v. Simpson*, 436 F.2d 162, 169 (D.C. Cir. 1970). "If the case has merit and a trial is required counsel should be appointed. The prisoner himself can simply not prepare and try the case effectively." *Chubbs v. City of New York*, 324 F. Supp. 1183, 1191 (E.D.N.Y. 1971). See ABA, MINIMUM STANDARDS FOR CRIMINAL JUSTICE: POST-CONVICTION REMEDIES § 4.4 (1968).

52. 409 F.2d 1337 (5th Cir. 1969).

its *absolute* ban on prisoner assistance, "whereas the Florida regulation . . . allows such assistance to be provided to illiterate inmates."⁵³

The court reasoned otherwise. Mutual legal assistance—at least in a jurisdiction providing no other help to inmates—could not be restricted to a bare minimum of the prison population:

Concededly, illiterates are likely to be among those most in need of help, and the exception made by the Florida regulation in such instances is desirable. *But we cannot agree that illiterates, either total or functional, are the only inmates in need of assistance in the preparation of petitions for post-conviction relief.*⁵⁴

A recent, widely-publicized Second Circuit decision cast further light on the reach of the *Johnson* case. In *Sostre v. McGinnis*,⁵⁵ which was principally a civil rights action for damages by an inmate who had been mistreated at Green Haven prison in New York, the Court of Appeals for the Second Circuit held that no showing of a reasonable alternative to jailhouse lawyers had been made by the prison authorities; hence, New York was required to "permit prisoner aid to the extent required by *Johnson*."⁵⁶ The question then became one of deciding what that extent was. The New York prison rule was that prisoners had to apply to the warden for permission to assist other inmates with their legal activities.⁵⁷ Since *Johnson* explicitly permitted each state to provide reasonable regulations in the area of legal aid for post-conviction relief, the Second Circuit was compelled to consider the "reasonableness" of the New York limitations under that broad standard. On this issue, the court stated that no violation of *Johnson* had occurred; indeed, there would have been a violation "only if the Warden denied permission, or if the conditions on which he granted it were unreasonable."⁵⁸ Since the plaintiff *Sostre* never requested permission, his claim for damages and an injunction were precluded as to this issue.⁵⁹

The Second Circuit in *Sostre* also discussed the Green Haven rule forbidding prisoners from sharing personal law books. The court

53. 409 F.2d at 1338.

54. *Id.* (emphasis added). Citing *Johnson*, the court stressed that "a high percentage of inmates who are literate but 'whose educational attainments are slight, and whose intelligence is limited,' . . . may be entirely incapable of pursuing their post-conviction remedies without the assistance of a third person." *Id.*

55. 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3431 (U.S. Mar. 6, 1972).

56. *Id.* at 201.

57. *Id.*

58. *Id.*

59. *Id.* But see *Prewitt v. Arizona*, 315 F. Supp. 793, 794 (D. Ariz. 1969).

held, consistent with one of its pre-*Johnson* decisions,⁶⁰ that this did not constitute an unconstitutional denial of access to the courts.⁶¹ As long as prisoners could acquire these books and other legal source material from prison officials under reasonable terms,⁶² no cause of action could be sustained on this ground.⁶³

The Fifth Circuit has recently decided what may well have been the most definitive of all the post-*Johnson* decisions. In *Novak v. Beto*⁶⁴ the court placed upon the Texas Department of Corrections the burden of showing the factors that justified a "no assistance" rule in that state's penal institutions. *Novak* was a class action brought under the provisions of 42 United States Code section 1983 (for violation of the petitioners' civil rights).⁶⁵ The complaint had alleged that various conditions⁶⁶ and aspects of the Texas prison system were unconstitutional, including the regulation that barred jailhouse lawyers and the rule that prisoners who rendered legal assistance to others could suffer a loss of "good time."⁶⁷

The Department of Corrections argued that its regulation was valid under *Johnson v. Avery* because the prison officials had provided a number of "reasonable alternatives" to mutual legal assistance. As the trial court had noted, the prison system offered some aid in the form of senior law students⁶⁸ and several staff attorneys.⁶⁹ More-

60. *E.g.*, *Williams v. Wilkins*, 315 F.2d 396, 397 (2d Cir. 1963) (denial of right to keep law books in cell where no allegation that prisoner precluded from use of prison library).

61. 442 F.2d at 202; *cf.* *Gittlemacker v. Prasse*, 428 F.2d 1 (3d Cir. 1970) (prisoner denied right to have law library in his own cell because of fire danger).

62. "[P]rison regulations which reasonably limit the times, places, and manner in which inmates may engage in legal research and preparation of legal papers do not transgress [the due process clause] so long as the regulations do not frustrate . . . access [to the courts]." *Gittlemacker v. Prasse*, 428 F.2d 1, 7 (3d Cir. 1970). *See also* *Glasshofer v. Sennett*, 444 F.2d 106 (3d Cir. 1971).

63. The Green Haven Prison regulations were held to have failed to satisfy the *Johnson* test in another recent case, *Carothers v. Follette*, 314 F. Supp. 1014, 1030 (S.D.N.Y. 1970).

64. 453 F.2d 661 (5th Cir. 1971), *rev'g in part*, 320 F. Supp. 1206 (S.D. Tex. 1970).

65. 42 U.S.C. § 1983 (1970).

66. Petitioners contended that the conditions of solitary confinement were violative of the Eighth Amendment; however, since the basic elements of hygiene were present, the court rejected this argument. 453 F.2d at 663-70.

67. Because the Department of Corrections did not provide a reasonable alternative to inmate assistance in habeas corpus matters, the loss of good time was restored to the petitioners. 453 F.2d at 664.

68. Apparently, three senior law students were employed during the summer of 1970 and some others had expressed interest to work during the entirety of the next school year. 320 F. Supp. at 1209.

69. *Id.*

over, each prison unit within the Texas correctional system possessed a "writ room," available to inmates each week during specified hours, in which each inmate could perform all his legal work.⁷⁰

However, the Department of Corrections failed to show the specific needs of its prison population (12,000 inmates)⁷¹ and exactly how they had been met. The Fifth Circuit explained that both of these elements must be shown before a "no assistance" regulation will be approved:

We would require the State to carry the burden of justifying its regulation against inmate assistance by producing evidence that establishes *in specific terms* what the need is for legal assistance on habeas corpus matters in the [Texas Department of Corrections], and by demonstrating that it is reasonably satisfying that need.⁷²

The Fifth Circuit made it clear that its decision in *Novak* was intended to afford corrections personnel rough guidelines of acceptable practice. The court did not chastise the prison officials; in fact, it stated that they had "been making a substantial effort since *Johnson v. Avery* to provide a reasonable alternative to 'inmate legal assistance.'"⁷³ The problem was that the Texas officials had failed to supply the numerous details that were relevant to determine how adequate the Texas alternative system really was.⁷⁴ As soon as the authorities

70. "A small 'library' is available there, and respondents have recently directed that prisoners be allowed to utilize the law books of fellow inmates as well as those maintained by the State. An extensive legal manual, composed in layman's language, will soon be available in the writ rooms and prison libraries to assist inmates in the preparation of petitions. In addition, prisoners may freely correspond with legal service organizations." *Id.* at 1208-09.

71. "In defining the need for assistance and in responding to the need, TDC [the Texas Department of Corrections] should give special consideration to the high illiteracy rate of the inmates, to the fact that a substantial number are Mexican-Americans who speak little English, and to the great geographical dispersion of the Texas correctional facilities." 453 F.2d at 664.

72. *Id.* The court said that the state could use any dependable type of substitute plan of legal assistance, either voluntary or remunerated; and even persons unlicensed to practice law (students or otherwise) might be acceptable as long as their service "could be systematically relied upon." *Id.*

73. *Id.*

74. "For instance, we would have been interested to know how many of the approximately 12,000 prisoners in the TDC expressed a need for legal assistance in seeking post conviction relief. There is vague testimony that only a small number of the total prison population actually are interested in seeking post conviction relief, but that testimony was insufficient to present any clear picture of the magnitude of the problem. Additionally, we would have been interested to know how much time is required to handle each prisoner's file. It might be, for example, that many of the complaints concern rather routine matters that could be handled adequately in an hour's time. If this were the case, the fact that a single attorney handled 1300 files his first year might be less striking. Moreover, the hiring of a second attorney and

had ascertained the specific details necessary to develop an alternative that would meet the test indicated in *Novak*, the court concluded, they were invited "to return to court to seek approval of that alternative."⁷⁵

Although *Novak* may have been the latest case decided by the Fifth Circuit on the inmate legal assistance problem, it does not represent that court's ultimate extension of the *Johnson* principle. That extension was seemingly made instead in the 1970 case of *Williams v. United States Department of Justice*.⁷⁶ In *Williams* the court indicated that even the development of a legal services program that was clearly a "reasonable alternative" to the use of jailhouse lawyers would not always be the complete answer. Rather, the court would inquire further into the actual ability of the institutional authorities to implement the alternative program; and where the plan indicated the likelihood that assistance to inmates would be unreasonably delayed, the plan would still be unconstitutional.⁷⁷

Finally, two other appellate cases decided since *Johnson* illustrate the changing relationship between legal assistance, prison confinement, and the constitutional concept of "access to the courts." In one decision, the Court of Appeals for the Seventh Circuit recently sustained (as stating a cause of action) an inmate's complaint for damages for confiscation and destruction of legal papers.⁷⁸ The court reasoned that the allegations, if true, constituted a cause of action under the Civil Rights Act for denial of reasonable access to the court.⁷⁹

In the second decision, the First Circuit determined that an in-

three summertime law students should have relieved the situation considerably, but we were given very little specific information as to what degree, if any, the situation was relieved. Finally, we were told nothing specific about what amount of outside legal assistance in the form of legal aid and public defender programs might be available to prisoners. *Johnson v. Avery* appears to invite states to utilize such outside help in providing alternatives to inmate legal assistance." *Id.*

Judge Tuttle, concurring in part, felt that the inability of the respondents to show these facts should be emphasized even further. He reasoned that "[t]his record affirmatively shows that the TDC has not supplied a reasonable alternative." *Id.* at 671. That fact, he felt, should dictate the reversal rather than rely on the mere failure to make a sufficient showing. *Id.*

75. *Id.* at 664.

76. 433 F.2d 958 (5th Cir. 1970).

77. "We believe that an eighteen-month delay is an unreasonable length of time for a prisoner to wait in order to file a petition for post-conviction relief." *Id.* at 960. See 28 U.S.C. § 2243 (1970), which provides for speedy adjudication of cases involving writs of habeas corpus.

78. *Sigafus v. Brown*, 416 F.2d 105 (7th Cir. 1969).

79. *Id.* at 107. See *Sostre v. McGinnis*, 442 F.2d 178, 189 (2d Cir. 1971), cert. denied, 40 U.S.L.W. 3431 (U.S. Mar. 6, 1972), where the court stated in dictum that "the Constitution protects with special solicitude a prisoner's access to the courts."

mate's complaint under the Civil Rights Act stated a cause of action where he alleged merely that prison officials refused to mail a letter he wrote to the American Civil Liberties Union.⁸⁰ In vacating the trial court's dismissal, the First Circuit commented on the growing right of prisoner legal assistance:

Johnson v. Avery clearly stands for the general proposition that an inmate's right of access to the court involves a corollary right to obtain some assistance in preparing his communication with the court. Given that corollary right, we fail to see how a state, at least in the absence of some countervailing interest not here appearing, can prevent an inmate from seeking legal assistance from bona fide attorneys working in an organization such as the Civil Liberties Union.⁸¹

Post-Johnson Cases: The District Court Level

Several recent federal district court decisions have suggested possible limits to the breadth of *Johnson*—generally by passing upon the constitutionality of a particular “alternative” to the jailhouse lawyer. In one case, the United States District Court for the Western District of Missouri indicated a program that might qualify. In that action, *Ayers v. Ciccone*,⁸² the state of Missouri relied upon a plan whereby the 285 inmates at the United States Medical Center for Federal Prisoners in Springfield would be rendered approximately twelve hours per week of preliminary legal assistance by a local attorney. One prisoner, confined within the medical center without legal assistance from fellow inmates, contended separately that as to him alone the regulation was invalid in effect.⁸³ The lower court rejected that claim as well, since he had access to some assistance on the part of law students from the University of Missouri at Kansas City Law School.⁸⁴

The decision in *Ayers* seems justified on its particular facts. However, in light of the Fifth Circuit's compelling analysis in *Novak v. Beto*,⁸⁵ it is questionable whether *Ayers* will be relied on in future decisions.

80. *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970).

81. *Id.* at 551. See *Freeley v. McGrath*, 314 F. Supp. 679 (S.D.N.Y. 1970).

82. 303 F. Supp. 637 (W.D. Mo. 1969); cf. *Leaper v. Birzgahs*, 314 F. Supp. 808 (W.D. Mich. 1969).

83. *Ayers v. Ciccone*, 431 F.2d 724, 726 (8th Cir. 1970). Because on appeal the inmate's separate challenge was directed toward the conditions of his confinement, and he has subsequently been released, the Court of Appeals for the Eighth Circuit dismissed the appeal as moot. However, the court commented that had the entire case been heard on the merits, the court would have been compelled to affirm.

84. 431 F.2d at 725.

85. 453 F.2d 661 (5th Cir. 1971), *rev'g in part*, 320 F. Supp. 1206 (S.D. Tex. 1970). See notes 64-75 & accompanying text *supra*.

In *United States ex rel. Stevenson v. Mancusi*⁸⁶ a federal district court in New York followed the rationale of *Wainwright v. Coonts*⁸⁷ and enjoined enforcement of a local variation of the "no assistance" rule. The regulation proscribed in *Mancusi* enunciated a policy that no inmate who tested over the fifth grade level was entitled to legal help from another prisoner. The court held that this rule was unreasonable since it conflicted with the basic principle that "[a]ny inmate desirous of legal assistance should have an opportunity to receive it under reasonable rules."⁸⁸ The court further explained, in perhaps the most concise and articulate statement yet presented in the case law, the reasons for the expanding definition of the "right" to legal assistance in prisons:

[T]he most important part of a legal assistance plan is not the law books or library, or the availability of decisions, but the opportunity to consult with an attorney, or at least a person of good common sense and experience who can, in a straightforward and complete manner, set forth the inmate's claim in understandable fashion. Because the present scheme does reach the standard required by *Johnson v. Avery* . . . the Department of Corrections must permit one inmate to assist another under reasonable regulation.⁸⁹

A late Wisconsin federal district court decision, *Cross v. Powers*,⁹⁰ sets forth a strict standard under *Johnson*. The court there held that a program will meet the "reasonable alternative" qualifications under *Johnson* only if it can truly "fulfill the prison population's need for assistance in the preparation of cases designed to vindicate federal constitutional rights."⁹¹ Thus, the court will ascertain whether the program is implemented and effective, not simply if it exists on paper.

In *Cross* the prison regulation prohibited (1) carrying legal papers to areas shared with other inmates, (2) passing legal papers to other inmates, (3) possessing legal papers of other inmates, and (4) preparing legal papers on behalf of or jointly with other inmates.⁹² The district court held that, despite the meaningful contributions of a law student assistance program, the Wisconsin Judicare institu-

86. 325 F. Supp. 1028 (W.D.N.Y. 1971).

87. 409 F.2d 1337 (5th Cir. 1969). See notes 52-54 & accompanying text *supra*.

88. 325 F. Supp. at 1033.

89. *Id.* at 1032.

90. 328 F. Supp. 899 (W.D. Wisc. 1971). Unlike *Johnson*, a habeas corpus action, *Cross* was a Civil Rights Act case. See 42 U.S.C. § 1983 (1970).

91. *Id.* at 904. As stressed in *Johnson*, access to the courts must be "effective," not hypothetical. *Id.* at 903.

92. *Id.* at 899-900.

tional services program,⁹³ and other legal aid agencies,⁹⁴ there was not a sufficiently dependable alternative to the jailhouse lawyer to justify barring inmate mutual legal assistance.

Probable Areas of Future Prisoner Complaints

Perhaps the next chapter in the growing right of "access to the courts" was foreshadowed in the case of *Clutchette v. Procnier*.⁹⁵ In *Clutchette* a San Quentin prisoner filed a civil rights action contesting the entire disciplinary system at his institution.⁹⁶ Federal District Judge Zirpoli, in a fully documented and well reasoned opinion, noted the traditional limitations on federal court intervention into the administration of state prisons; nevertheless, he held that the disciplinary procedures employed at San Quentin violated the due process and equal protection clauses of the Fourteenth Amendment.⁹⁷ Judge Zirpoli explained that a more complete set of procedural safeguards was imperative. This was especially true because conviction of a disciplinary infraction would result in serious punishment, including solitary or segregated confinement or possible increased sentence, simply by referral of the disciplinary action to the adult authority.⁹⁸

Most important in terms of prisoner legal assistance was the fact that Judge Zirpoli held that counsel for inmates at disciplinary hearings was required when the charges against them could be referred to the

93. Wisconsin Judicare is a federally funded legal services program run under the auspices of the Wisconsin State Bar; it assures the state prison of visits approximately twice a month by staff attorneys. Limitations of time, personnel, and financial resources have minimized the litigation resulting from this assistance; in fact, only one lawsuit has been filed by Wisconsin Judicare against the Division of Corrections since October, 1969. *Id.* at 900.

94. "[T]he State Public Defender serves when appointed by the Wisconsin Supreme Court on direct and collateral attacks on convictions; the clerk of the Wisconsin Supreme Court provides forms for habeas corpus petitions; the Wisconsin Service Association helps with clemency matters; and the American Civil Liberties Union will occasionally represent an inmate in a lawsuit raising constitutional issues. There is no agency or individual, public or private, available to assist inmates in the preparation of civil rights suits." *Id.* at 900-01.

95. *Clutchette v. Procnier*, 328 F. Supp. 767 (N.D. Cal. 1971).

96. Similar actions have successfully been filed in several jurisdictions in recent years. *E.g.*, *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).

97. 328 F. Supp. at 784. The questioned procedures failed to render adequate notice of charges of alleged disciplinary infractions, denied the prisoner an opportunity to summon favorable witnesses and to cross-examine hostile or unfavorable witnesses, prohibited counsel or counsel substitutes, and did not guarantee decision by an unbiased fact finder. *Id.*

98. *Id.*

district attorney.⁹⁹ And in all other disciplinary proceedings, he reasoned that prison officials should not be precluded from providing an adequate counsel substitute, seemingly an acceptable alternative under *Johnson v. Avery*.¹⁰⁰

The same kind of procedural due process challenges made in *Clutchette* will no doubt be made, as they have unsuccessfully been made in the past, against the procedures employed by parole authorities, although the most recent cases have unanimously denied the right to counsel at parole revocation proceedings.¹⁰¹ A few recent cases do seem to apply stricter standards for revocation of parole,¹⁰² however, and it may be that at last some reform of parole revocation procedures will be forthcoming.

The Need for Prisoner Legal Services Programs

It is somewhat anomalous that the indigent outside prison walls can use the resources of various federally-funded legal service programs, while the indigent prisoner is denied such allocations.¹⁰³ But who should need legal assistance more than the indigent inmate, condemned for a period of years to an institution and within a system quite likely to appear to him both unjust and inhumane?

One problem is determining who should finance or sponsor prison legal services. Recently, the Texas Criminal Justice Council provided one alternative. It directed that state's Department of Corrections

99. *Id.* at 783.

100. *Id.*

101. *E.g.*, *Bearden v. South Carolina*, 443 F.2d 1090 (4th Cir. 1971); *In re Tucker*, 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761 (1971); *cf.* *People v. Ray*, 181 Cal. App. 2d 64, 68, 5 Cal. Rptr. 113, 116 (1960), *cert. denied*, 366 U.S. 937 (1960) ("A prisoner has no constitutional right to notice, a hearing, or counsel in the proceedings of the Adult Authority in fixing his sentence."). *See also In re Cleaver*, 266 Cal. App. 2d 143, 72 Cal. Rptr. 20 (1968). For a thorough treatment of the reasons for counsel in parole revocation hearings see *In re Tucker*, 5 Cal. 2d 171, 204-08, 486 P.2d 657, 95 Cal. Rptr. 761, 783-86 (1971) (Tobriner, J., dissenting opinion); Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CALIF. L. REV. 1215 (1971); Comment, *Parole Revocation Hearings—Pro Justicia or Pro Camera Stellata?* 10 SANTA CLARA LAW. 319 (1970).

102. *See, e.g.*, *Mitchell v. Wainwright*, 308 F. Supp. 436 (M.D. Fla. 1969); *Arbuckle v. Turner*, 306 F. Supp. 825 (D. Utah 1969).

103. "Jailhouse lawyers"—inmates with claimed expertise of a kind—are often the only help a prisoner has. . . ." NATIONAL COUNCIL ON CRIME & DELINQUENCY, A MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS 14 (1972). *But see* N.Y. Times, Feb. 20, 1972, at 63, col. 6 (Texas Department of Corrections allocated \$402,593 in federal "anticrime funds" for the purpose of having ten attorneys and establishing thirteen law libraries for its inmates).

to allocate a portion of its federal "anticrime funds" for inmate legal assistance.¹⁰⁴ The council, acting under a federal court order, stated that such an action—leading to the hiring of attorneys for prisoners—would be the only way the State of Texas could continue to bar jailhouse lawyers; *Johnson v. Avery* so compelled.¹⁰⁵

However, the burden of providing prisoner legal assistance programs probably should not be shifted to governmentally funded programs, such as OEO legal services. It would seem that better results could be achieved by *private* or *quasi-private* funded programs. For privately funded programs can more effectively test and confront the bureaucratic, government-staffed prison system, because private sources would need to surmount fewer "political" obstacles. Moreover, bar associations and law schools, which until recently have been quite slow in recognizing the needs of our prison systems,¹⁰⁶ obviously have available resources and expertise to assist in meeting the growing prisoner legal demands.¹⁰⁷ Certainly programs by which various legal or-

104. N.Y. Times, Feb. 20, 1972, at 63, col. 6. See note 78 *supra*.

105. *Id.*

106. It is interesting to note, however, that one of the major arguments raised in some of the "jailhouse lawyer" cases, seemingly protective of the lawyer's role, is that the practice of law should be limited to those licensed to practice law, and that "jailhouse lawyers" are not so licensed. See *Johnson v. Avery*, 393 U.S. 483 (1969).

107. *United States v. Simpson*, 436 F.2d 162, 169 (D.C. Cir. 1970), quoting *Wilson, Legal Assistance Project at Leavenworth*, THE BRIEFCASE 254 (1966): "The law schools of the country have found that counseling of prison inmates has not only achieved objectives in terms of improvement of administration of justice, but has given the students, who show strong motivation, 'an extraordinary learning experience.'" See *Burkin, Impact of Changing Law upon Prison Policy*, 48 PRISON J. 47 (1968) (prison legal aid programs have depended largely on cooperation of institutional authorities). But see *Chubbs v. City of New York*, 324 F. Supp. 1183, 1191 (E.D. N.Y. 1971): "We must recognize that the resources of the bar for *pro bono* work are limited. . . . Diverting legal resources from work for the ghetto poor who ultimately might be helped by lawyers to prisoners who cannot seem non-utilitarian by any rational calculus." See also *Cahn & Cahn, Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1008 (1970).

And the resort to law students may also be an unsatisfactory choice since it may not provide full legal assistance. *Chubbs v. City of New York*, 324 F. Supp. 1183, 1192 (E.D.N.Y. 1971): "Establishment of a screening device through the use of law students or others at the prisons would improve the quality of the papers received by the courts. It might also dissuade some prisoners from wasting their, and the court's, time with meritless litigations, allowing concentration on more useful rehabilitation activities. . . . But it seems unlikely to entirely solve the problem. It can be expected that any law school program in a prison will be primarily directed towards pedagogical goals rather than the needs of the whole prison population." Moreover, it is possible that the cooperation between prison officials and law students would be severed, or at least be quite strained, if the school legal aid program assists in a court action of inmates against the prison officials themselves. See *Jacob & Sharma, Justice*

ganizations contribute their services to indigent prisoners should be seriously encouraged.

The threshold question of whether lawyers are really *needed* in prisons remains. The prisoner does require "the opportunity to consult with an attorney, or at least a person of good common sense and experience who can, in a straightforward and complete manner, set forth the inmate's claim in an understandable fashion."¹⁰⁸ More than that, the prisoner may, in some instances, need actual dialogue with an attorney (or a law student supervised by an attorney) even to determine whether he has a possible case.¹⁰⁹

Perhaps the face-to-face dialogue with an attorney might also help eliminate tensions and frustrations within our increasingly violent prison system. Many indigent prisoners serve years in prison without any visitors from the outside, and lawyers would provide the prisoner with at least some guarantee of continued communication with the outside world.¹¹⁰ There is nothing more shocking than to visit an indigent prisoner with respect to his legal problems and find, as has occurred with this author, that your name is the first to appear on his visitation sheet over the last four or five years. Over such a long time period many prisoners are likely to lose touch with reality, including legal reality, especially in a system where myths about the law flourish, and an attorney can at least help assure that each prisoner with whom he confers is presented a reasonable picture of the realities of his confinement.

After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process, 18 KAN. L. REV. 493, 620 (1970). But see San Francisco Recorder, Nov. 26, 1971, at 1, col. 1 (Stanford law students encouraged in program of helping selected inmates challenge the California Youth Authority).

108. *United States ex rel. Stevenson v. Mancusi*, 325 F. Supp. 1028, 1032 (W.D.N.Y. 1971).

109. See *Chubbs v. City of New York*, 324 F. Supp. 1183, 1189-93 (E.D.N.Y. 1971), where the court discussed the need for counsel in postconviction proceedings and stressed the dilemmas facing a *pro se* prisoner petitioner or plaintiff. See ABA, MINIMUM STANDARDS FOR CRIMINAL JUSTICE: POST-CONVICTION REMEDIES §§ 3.1-4.5 (1968); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 83-85 (1967); *Id.*, TASK FORCE REPORT: THE COURTS 47, 54 (1967); SYMPOSIUM ON POST CONVICTION REVIEW 33 F.R.D. 409 (1963); REPORT OF COMMITTEE ON HABEAS CORPUS AND POST CONVICTION REVIEW OF THE UNITED STATES JUDICIAL CONFERENCE, 33 F.R.D. 363, 367 (1963); Jacob & Sharma, *supra* note 107; *Law Student Clinical Work in Prisons & Jails*, III Council on Legal Responsibility, Inc. (No. 3, Nov. 1970); Larsen, *A Prisoner Looks at Writ Writing*, 56 CALIF. L. REV. 343 (1968); Note, *Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates*, 54 IOWA L. REV. 1147, 1154 (1969); Note, *Legal Services for Prison Inmates*, 1967 WIS. L. REV. 514.

110. See Larsen, *supra* note 109, at 352.

If, then, it is recognized that the prison system would be improved through an increased time and energy commitment of the legal profession to make access to the courts an even more meaningful right, then the next step must be taken by the bar itself. Programs sponsored by the Young Lawyers Section of the American Bar Association Prison Visitation Program¹¹¹ and legal actions such as the "jail suit" filed by a group of San Francisco attorneys for prisoner clients,¹¹² suggest the direction that must be followed. These initial forays have proved rather encouraging, but much has yet to be accomplished. A great many obstacles must be overcome before the prison system could begin to be truly effective and just. And the need for improvement is becoming quite apparent; indeed, the tragic violence at San Quentin and Attica is clear evidence that a stable, rational approach to prison problems is imperative. Lawyers and legal organizations must help develop and implement such an approach.¹¹³

111. See 15 A.B.A. News, No. 12, Dec. 1970.

112. See note 4 *supra*.

113. The American Bar Association has appointed a Commission on Corrections to inventory the present correctional system and recommend "specific measures of improvement." 15 A.B.A. News, No. 3, Mar. 1970.

